

1 **UNITED STATES OF AMERICA**
2 **FOR THE NORTHERN DISTRICT OF OHIO**
3 **EASTERN DIVISION**

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4 IN RE: NATIONAL PRESCRIPTION)
5 OPIATE LITIGATION)
6) Case No.
7 THIS DOCUMENT RELATES TO:)
8)
9 Case Track 3) 1:17MD2804
10)
11)
12 Hon. Dan A. Polster
13)
14)

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16 **TRANSCRIPT OF TELECONFERENCE STATUS BEFORE**
17 **HONORABLE JUDGE DAN A. POSTER, JUDGE OF SAID**
18 **COURT, ON WEDNESDAY, MARCH 10TH, 2021,**
19 **COMMENCING AT 1:30 O'CLOCK P.M.**

20 - - - - -

21 Court Reporter: GEORGE J. STAUDUHAR
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1 P R O C E E D I N G S

2 THE COURT: Okay. We have got the court
3 reporter?

4 COURT REPORTER: Yes, Judge. It's George.

5 THE COURT: Okay. Hi, George. All right.

6 Well, this is our monthly status call in
7 Track 3. I appreciate the status report. This one is
8 not going to be pro forma like some of the more recent
9 calls because I want to -- that's why I required the
10 party representatives.

11 The first thing is that the Track 3 trial
12 that is now scheduled for October, my intent is it is
13 going forward. Our Court is resuming jury trials
14 beginning of May.

15 For May and June, we are keeping the
16 conditions we had last fall, trials no more than five
17 days, and no significant COVID objections, but I don't
18 expect those limitations.

19 We will be continuing, and Judge Gaughan
20 knows that I have this case scheduled for October, and
21 she has okayed it. And if by some chance -- you know, by
22 then, anyone who wants a shot will have been able to get
23 them, and if by some chance the pandemic takes a really
24 bad turn, we can always do this trial virtually.

25 But my intent would be to pick the jury in

1 person, and they will probably deliberate in person, but
2 if we have got to do the testimony by zoom, so be it.
3 So everyone should make plans, if we have to try it, we
4 will try it in October as scheduled.

5 And Robert Pitts from our Clerk's Office
6 will be courtroom deputy for the trial, and James Jones
7 from our IT department will be handling all the IT work,
8 so people can coordinate with them.

9 The second thing is, I need to discuss
10 really the balance of the MDL, which is now in my view
11 primarily with the pharmacy Defendants. Everyone knows
12 because they have been reading in the paper that over the
13 last year-and-a-half the PEC and the AGs have been
14 negotiating to try and put together a global deal with
15 the three big distributors and J & J. That almost
16 happened a year ago. Everyone knows what the dollar
17 amounts are because that has been in the paper, too.

18 I expect that that's going to happen. There
19 is enough pressure because of imminent trials that I
20 think it is going to happen soon. A couple of
21 manufacturers, there are various discussions going on
22 there. That leads to the pharmacies. There are five
23 Defendants in this case.

24 Giant Eagle is pretty local. The other four
25 are national. The only pharmacy Defendant in Judge

1 Breyer's case in San Francisco, I believe, is Walgreens.
2 The other three are not in there, and while the
3 pharmacies are included as Defendants in the state case
4 in New York, it has just been moved from March to June.
5 And I am sure will go forward, my understanding is that
6 they only have distribution claims, not dispensing
7 claims.

8 So it is not the full set of claims. I had
9 urged the parties a year ago to engage in some serious
10 settlement discussions. The pharmacies didn't want me
11 doing it. I said okay. Then, you need to do it
12 privately. Pick a mediator. Everyone picked Judge
13 Gandhi. He had a number of meetings.

14 He has not communicated with me, but I have
15 been told that he has ended his mediation efforts, and
16 that there are no discussions going on now.

17 Is that correct, that there are no ongoing
18 discussions with Jay Gandhi?

19 MS. TABACCHI: Tina Tabacchi from Jones Day,
20 your Honor. That is correct, that the mediation has been
21 terminated before Judge Gandhi.

22 THE COURT: All right. Well, again, he
23 didn't communicate that with me, but I had learned that.
24 So I don't know what happened over the last year. I
25 think a whole year was wasted.

1 You know, I don't know -- I know that the
2 PEC and the AGs are willing to seriously discuss global
3 settlement because they have done it with other
4 Defendants. So I don't know if the impediment was that
5 the pharmacies were not interested in global resolution,
6 or while both sides were interested, they were so far
7 apart that Judge Gandhi felt he couldn't do anything
8 further.

9 But as I've said many times, I think
10 settlement would be harder, not easier, after we conclude
11 this October trial, and if there needs to be a bench
12 proceeding afterward after that, if the Defendants win,
13 the Defendants are going to say "at least we said there
14 is no liability. We are not going to pay anything."

15 If the Plaintiffs win, then, every county in
16 the country is going to say, "you know, our case is just
17 as strong as Trumbull and Lake Counties, and we want that
18 much if not more" and be impossible to resolve.

19 So unless someone has any better
20 suggestions, I see no alternative but to tee up some
21 number of additional cases for trial, and the number we
22 will discuss now. The number needs to be number of cases
23 that are tried to verdict.

24 Both sides will feel we have a good sense of
25 how this is going to shake out, and we will use it to

1 resolve the balance, and what number it is, we can
2 discuss that. I have some idea, but my thought is that I
3 would keep these cases for discovery because it is going
4 to be far more efficient for me along with Special Master
5 Cohen to manage them and keep them coordinated and moving
6 forward than to have a bunch of different judges doing
7 it. Obviously, if the cases need trial, they will need
8 to be remanded to those Districts.

9 Whether or not I keep them also for
10 dispositive motions and Daubert motions, that's something
11 I would probably discuss with Judge Caldwell who chairs
12 the JPML. I can decide that down the proceed.

13 So unless, you know, -- my preference of
14 course, is to have the PEC and the AGs and these
15 Defendants engage in significant settlement discussions,
16 but of course, I can't order that or mandate that. If it
17 is not -- there is no willingness on both sides to do it
18 now, then I have just got to proceed with this other
19 approach.

20 And my thought is these additional trials
21 should be streamlined and focused like this one involve
22 only the pharmacies. And I don't think they need Giant
23 Eagle. My guess is Giant Eagle, they told me they only
24 operate in Ohio.

25 So there is no -- they wouldn't be involved

1 in the other cases around the country, and it probably
2 makes sense to just have public nuisance just like this.

3 There will be -- public nuisance is
4 different in each state. I don't know if there is some
5 compelling to have RICO, but I think it complicates
6 things, but I will leave that to the parties to structure
7 and streamline these cases, so they can be tried in a
8 reasonable time, and everyone can look at the results.

9 So I guess my question is -- and it is
10 probably -- well, both sides, but I will start with the
11 Defendants, how many verdicts do you think will be
12 necessary to give you a sense of whether these cases
13 overall should be settled? How many additional -- in
14 addition to the one we will get here in my case, how many
15 additional?

16 MR. STOFFELMAYR: Judge, its Caspar
17 Stoffelmayr. If I could say a couple things. I don't
18 have an answer to your question, what's the right number,
19 but --

20 THE COURT: We are going to come up with it
21 today, Kaspar.

22 MR. STOFFELMAYR: But I did want to comment
23 on something you did say earlier because I think it makes
24 this -- I don't want to make it more complicated, but
25 there is something else going on here when you put it

1 like that.

2 First, the point, a factual clarification,
3 as far as federal cases that are currently going forward,
4 of course, there is also the Cherokee Nation case and
5 some of the pharmacies --

6 THE COURT: I understand that, but there is
7 no trial set, Kaspar. So I have no idea -- the
8 pharmacies are in there and eventually, but it is not --
9 I don't control the timing or anything.

10 MR. STOFFELMAYR: The other thing I think we
11 need to keep in mind that, you know, you made a point
12 about Giant Eagle being in this case, not being in other
13 cases, but in every case -- or I shouldn't say every
14 case -- in virtually every case, there is a Giant Eagle.

15 There are very significant local players who
16 are sometimes part of the litigation, sometimes not. It
17 might not be Giant Eagle. It could be a different
18 supermarket chain. It could be a major regional drug
19 chain.

20 At one point Discount DrugMart was in the
21 Track 1 cases. And so if the way you structure it is to
22 say we are only working for a nuisance case and we are
23 only working for a case involving these four chains,
24 there are other chains that are not maybe as big as
25 Walgreens or CVS but certainly approaching in size, a

1 Rite Aid or a Wal-Mart, you are already sort of
2 gerrymandering the universe of cases that are available
3 for consideration.

4 I mean, you would have to find Plaintiffs
5 who are willing to say, you know, forget about the major
6 local players. We are happy to litigate only against
7 these four and also Plaintiffs who are willing to say we
8 will dispense with all but our nuisance claims.

9 Surely such Plaintiffs exist, but you are
10 giving Plaintiffs, you know, sort of complete control
11 over which are going to be the cases that are candidates,
12 and maybe that's okay, but we should all understand, if
13 you are asking us how many cases would we have to try to
14 feel like we understand what the board really looks like,
15 that's not going to happen, at least not very easily if
16 the only cases that are tried are cases in which the
17 parties and the claims have been sort of gerrymandered in
18 a way that makes them seem very unrepresentative.

19 And there are effectively cases hand
20 selected by Plaintiffs because we have given them veto
21 power to exclude cases simply by saying, you know what?
22 I don't want to give up my RICO claims. I don't want to
23 give up my claim against Supermarket Chain X.

24 THE COURT: Well, I was going to assume that
25 both sides are going to work together. I was going to

1 request Plaintiffs, the parties to work together, and see
2 how many you can agree on, and if you can't, you know,
3 the Plaintiffs can suggest X and the defense can suggest
4 X, and I will probably pick some from each of the list.

5 I mean, I have done that in the prior MDL.
6 So again, you all have to figure this out. I mean, my
7 preference is we have meaningful settlement discussions
8 now. I think candidly everyone knows the dollar amounts
9 that the distributors and J & J are paying. All right.
10 That's there. It seems to me that's the benchmark.

11 Now, I am sure these Defendants will say we
12 are going to pay far less. The Plaintiffs probably
13 should say, well, you should pay far more, but it is
14 there. But if you need multiple verdicts, then we got to
15 start moving toward that.

16 And the question is, how many? And you
17 know, I don't know what to do about these local players
18 candidly. You all have to figure this out. The question
19 is, how many trials do we need? So that's a question to
20 the Plaintiffs and the Defendants.

21 If the Plaintiffs have a suggestion as to
22 the number -- I mean, I understand how expensive this is
23 for both the Plaintiffs and -- everyone knows the
24 Plaintiffs' lawyers are laying out all this time and
25 money on the if-come. It is a staggering amount so far,

1 but I understand that. They will do it.

2 Defendants all have tons of money. Clearly,
3 I can't imagine that the Defendants' strategy is to try
4 hundreds of these. I mean, if that happens, the only one
5 left will be Wal-Mart. There will be a monopolist. I
6 can see why they want it, but I don't see why the others
7 would.

8 So I am assuming that there is some number
9 we need. So I would like to hear from both sides as to
10 what you think, what number you think that is, and we
11 will start the process.

12 MR. DELINSKY: Your Honor, this is Eric
13 Delinsky for CVS. It is a fair question.

14 The factor that we have to consider in
15 answering that are the trials that are set in state cases
16 because they bear on the exact same question, and they
17 inform the analysis in the same way that another federal
18 trial would.

19 In other words, we currently have a trial
20 date in a West Virginia state bellwether case for
21 November. That date may or may not remain in that case,
22 may or may not include dispensing claims as opposed to
23 only distribution claims or in them.

24 There is a date in a Florida AG suite for
25 the spring of the 2022 that includes two of us. There is

1 another date in the spring of 2022 that includes another
2 state AG case, that includes three of us, and the list
3 goes on.

4 My only point in speaking up is to raise
5 the fact that there are these other state suits out
6 there that will provide the benchmarking that you are
7 raising.

8 THE COURT: It may or may not. If they go
9 forward, I have zero control over any of those cases,
10 what those judges do, what claims are in, what Defendants
11 if they ever go forward, so all I can do is the ones I am
12 in charge of, which is all the federal ones, so I agree
13 you may get some input.

14 If some of these go to trial, you can factor
15 that in. The question is -- but I have got to make sure
16 that regardless in case none of those cases go to trial,
17 we will have a meaningful number of federal verdicts if
18 that's what the Defendants want and what they need.

19 Are you telling me you need those before
20 you can meaningfully get down and try to resolve
21 this?

22 MR. DELINSKY: At this point in time, your
23 Honor, we do not -- and speaking only for CVS -- need
24 additional federal bellwethers. We feel as though we
25 have a sufficient number of bellwethers as currently

1 structured.

2 THE COURT: Except we don't know, Eric, if
3 any these are going to happen, and they don't -- I don't
4 know if they include dispensing claims, distributor
5 claims, whatever though --

6 MR. DELINSKY: Your Honor, I understand your
7 concerns and your questions. I am hearing them. I would
8 just like to go back to something that Mr. Soffelmayr
9 said.

10 Speaking for CVS, I would predict, speaking
11 for the other pharmacies -- and I know it is not what you
12 had envisioned for today -- I do think it would be
13 helpful if we could have a few days at least or a week to
14 go back, look at the trial schedules, put in a submission
15 to you setting forth when they are, where they are, what
16 kinds of claims they may or may not have included. It is
17 a puzzle piece, it is. And it requires some thought, at
18 least on my part.

19 THE COURT: Any of the other Defendants want
20 to say anything?

21 Do the Plaintiffs want to say anything as to
22 what they think I should set?

23 MR. RICE: From past experience, I think you
24 should set five cases for trial for -- to work them up
25 geographically disbursed. I know that you -- I think you

1 take senior status -- I think I read that -- so I know in
2 some MDLs, the judges that have taken senior status will
3 actually go to another jurisdiction through the proper
4 channels.

5 THE COURT: I am not planning to do that,
6 Joe. These will go to different judges. They will go to
7 five different judges in those districts. I am not going
8 to be doing that.

9 MR. RICE: Well, we think you should take
10 five cases and work them up, that in conjunction with
11 what may or may not take place in state court, but over
12 two thirds of the cases are in your courthouse and maybe
13 more than that, a higher percentage than that.

14 So I don't think five federal cases is too
15 many at all, and we should be able to get to know where
16 everybody is at the conclusion of those.

17 THE COURT: All right. Well, I was actually
18 thinking of five. All right. Plus I have got this one,
19 and that would give six, plus whatever you get out of the
20 state court, you know, whatever happens there.

21 So I think that's what I am inclined to do,
22 just direct the parties to come up with these cases. And
23 again, I don't want to do this. It is a huge amount of
24 work for me and Special Master Cohen. Everyone is paying
25 him. This results in a huge amount of work for those

1 five judges. Don't blame me, but I will take that peak.

2 Again, if the Defendants -- if Defendants
3 say they need -- you know, they are not willing to
4 seriously explore resolution now, then, I have no other
5 choice, and I can't get any, you know, I can't make the
6 Defendants to talk to me privately. They have chosen not
7 to.

8 I just have to go with what I see and what I
9 know from my experience, and if the Defendants are
10 willing to talk to me privately, I am happy to have those
11 discussions, but in the absence of that, I see no other
12 alternative.

13 So I will direct -- I am going to direct the
14 parties to come up with five cases, and hopefully, you
15 can agree on some or all of them.

16 MR. STOFFELMAYR: Judge, it is Kaspar. May
17 I offer a few thoughts before you issue a final order or
18 put something in writing?

19 THE COURT: Yes.

20 MR. STOFFELMAYR: One, is because some of us
21 have a much heavier state court trial schedule than
22 others, we may propose anyway that these five cases not
23 all necessarily be five cases that involve all four
24 Defendants because some of us will end next year with
25 three or four verdicts and some with one or two, and so

1 that calculus will -- may be a little different depending
2 on the Defendant.

3 The other thing I would ask you to consider
4 is that we not lock ourselves into trying to try cases
5 that are simultaneously supposed to be representative and
6 only public nuisance cases only involving a small subset
7 of Defendants.

8 And I don't just mean that in the abstract,
9 but on the public nuisance cause of action, you know, we
10 already know, for example from the state court
11 litigation, that numerous state judges have rejected
12 those claims.

13 They said there can't be a public nuisance
14 claim like that under the laws of their case, and in some
15 states, that has conflicted with orders in the MDL Court
16 under the same state law. And even so, unless you are in
17 a state where the law is very clear and there are only a
18 handful of those, anyone is going to know that a public
19 nuisance verdict is going to be very vulnerable on appeal
20 just on the question whether a public nuisance claim even
21 exists here.

22 So I would suggest we, at least, have the
23 option of thinking about whether there are instances
24 where the, quote unquote, representative case we should
25 be trying to make it actually representative isn't

1 exclusively a public nuisance case.

2 THE COURT: I really don't care. If you
3 want to forget public nuisance, you want to go with RICO
4 all around the country, RICO is the same everywhere,
5 federal law. That's fine. You want to forget public
6 nuisance and just go RICO, all right, fine.

7 MR. STOFFELMAYR: And I hope you are not
8 misunderstanding me. I am not saying, telling anyone is
9 saying we want to forget public nuisance. I was just
10 asking the Court not to enter an order saying we are
11 absolutely limited on all sides to public nuisance.

12 THE COURT: Well, but I think they have got
13 to include all the national Defendants. The idea of
14 having two or three -- everyone should be in. If you
15 want to include a bunch of regional people -- I don't
16 think you should be cluttering these trials up with too
17 many Defendants.

18 MS. MOORE: Your Honor, this is Kelly Moore
19 for Rite Aid. I would just point out that Rite Aid has
20 never been a national chain. At its biggest, it was in
21 30 states, and currently, it is in 18. So I don't know
22 it is in the same category.

23 THE COURT: Well, look, I can't -- you know,
24 you all are going to have to work this out. This is why
25 -- I don't want to do any of these other trials, but

1 again, the pharmacists aren't giving me a lot of choice.
2 The pharmacies are not giving me much choice. That's why
3 I have got the clients on here. All right. The clients
4 have to decide what they want to do.

5 They want to hemorrhage money trying these
6 cases all over the country in state and federal court
7 forever, they have a legal right to do it until they
8 drop, go bankrupt, or win them all, the Plaintiffs might
9 quit. But no other -- I can say categorically no other
10 Defendants in this MDL is operating that way.

11 They have all been willing to, at least
12 seriously, explore resolution. Some have gone into
13 bankruptcy because that was their only option, but I
14 believe every other Defendant expects a willingness to
15 explore resolution, but if the pharmacies choose not to,
16 that's their right.

17 Okay. But, then they are going to be
18 litigating all over the country. That's the only thing I
19 can do. So you all figure this out. You get me the
20 cases. If you don't get them, I will pick them myself.
21 All right. So --

22 MS. MOORE: Your Honor, once again, Kelly
23 Moore --

24 THE COURT: -- if you figure out something
25 better and you want to engage in some significant

1 settlement discussions and you want my help, everyone
2 knows how to reach me.

3 Yes, Kelly?

4 MS. MOORE: Once again, for Rite Aid, your
5 Honor, I don't think it is a fair assumption to say the
6 Defendants have not been willing to engage in serious
7 settlement negotiations. I know your Honor is not fully
8 aware of the negotiations and discussions with
9 Judge Gandhi, but from my standpoint, I would not say
10 that's an accurate or fair characterization.

11 THE COURT: Well, I meant to say, it is
12 either that or the parties are so far apart in the way
13 they see things that there wasn't anything to do, and
14 that they need verdicts. So I said it is one of the two.

15 But again, since, you know -- I would only
16 know if I were involved I can only guess, speculate.
17 That's put me at a real disadvantage, but they need to
18 understand that they are the ones who put me at the
19 disadvantage because I have to operate without knowledge,
20 so you can't complain that I don't have knowledge, full
21 knowledge. That's on you.

22 I got to do the best I can. I have this
23 Herculean task that the judicial branch has given me;
24 didn't ask for it, but I will do it the best I can. So I
25 am thinking that we need five federal cases. I am hoping

1 that over the next few weeks the parties will sit down
2 and figure out which are the best ones and what -- you
3 know, again, maybe some are public nuisance, and some are
4 RICO. Maybe they are all public nuisance. Maybe they
5 are all RICO. I don't think it should be both public
6 nuisance and RICO. I think that makes the case too
7 complicated. You only get one set of damages anyway.

8 So I was going to suggest to give the
9 parties until March 31st. That's about three weeks to
10 get me -- to work together to try and get me five cases,
11 and you know who the Plaintiffs are going to be, who the
12 Defendants are going to be and what causes of action, and
13 if you agree on all five, that's fine.

14 If you agree on two, then I will need
15 Plaintiffs' list of three and Defendants' list of three,
16 and I will need enough data in there, so I know what you
17 are talking about and why you think that's a good case so
18 I can decide, you know, fill up the other three.

19 If you agree on only one, then it is four
20 and four. If you agree on none, then you each give me
21 your five, and I will pick them.

22 And again -- what I thought is, we will have
23 our next status call I am thinking April 7th, Wednesday,
24 April 7th, at noon. That will give me a week to study
25 it, and I may have some questions at that time if there

1 are follow-up questions to help me decide, and then, at
2 that conference or shortly thereafter, we will finalize
3 the list of five, and then, I will direct the parties to
4 come up with a litigating schedule.

5 And off you will go. Again, I really don't
6 want to do this, but unless someone has a better idea, I
7 don't see any other thing I can do. Again, I am mindful
8 of the tremendous expense on both sides that this will
9 entail, and from where I sit, I don't think -- I think
10 everyone knows enough to seriously, at least, try to
11 settle these cases, but that's me, and I respect the fact
12 that one side or the other thinks they need a lot more
13 data, this is the way to get it.

14 And so I know there was a motion that the
15 Plaintiffs filed about adjusting time for expert
16 depositions. I don't care. I mean, when you figure out
17 -- you know, we figure out these extra trials, there is
18 five additional trials, you know, the parties should
19 confer. The point the Plaintiffs are making I agree
20 with. It is wasteful, wasteful time and money to depose
21 the same expert multiple times on the same testimony.

22 If there is generic testimony that applies
23 to all five of these trials, well, you should only depose
24 the expert once on that. And if there is case specific
25 things for a particular county, obviously, that has to be

1 probed for each time.

2 I think that's the thrust of the Plaintiffs'
3 motion, but I am not sure what they propose as the way to
4 do it, and I will just leave that to the parties to work
5 out. If you can't and you need Special Master Cohen's
6 help, he can do it, but I am not going to change anything
7 at the moment.

8 All right. Anything else that anyone wanted
9 to bring up?

10 MR. STOFFELMAYR: Not today for the
11 Defendants. Thank you, Judge. Caspar Stoffelmayr
12 speaking.

13 THE COURT: All right. Anything from the
14 Plaintiffs' side.

15 MR. WEINBERGER: This is Pete, your Honor.
16 No, nothing more from the Plaintiffs.

17 THE COURT: All right. And again, if the
18 Defendants choose to reconsider my offer to engage
19 everyone -- and by everyone I mean both the PEC and the
20 attorneys general because, again, there is no way to do
21 -- every time in this MDL over the last four years anyone
22 has tried to do something piecemeal, it has run aground,
23 and it always will.

24 So if the Defendants want my help trying to
25 bring everyone together, you know, it is always

1 available. I am available. So you know how to reach me.

2 Okay. Thanks, everyone. Stay safe. We are
3 adjourned.

4 (Hearing concluded at 2:08 p.m.)

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6
7 C E R T I F I C A T E

8 I, George J. Staiduhar, Official Court
9 Reporter in and for the United States District Court,
10 for the Northern District of Ohio, Eastern Division,
11 do hereby certify that the foregoing is a true
12 and correct transcript of the proceedings herein.

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